be unbundled unless the parties negotiate an amendment that provides for AT&T to gain access to U S WEST's network for purposes of combining elements.

2. Issue No. A-2: Intellectual Property - Part A, Section 5

22. As stated by U S WEST, the dispute over intellectual property provisions involves two distinct issues related to requests made by AT&T for a service that involves the intellectual property of a third party. The two issues are: (1) which party must obtain the third party's permission for the use of that intellectual property, and (2) who should bear the responsibility if that third party refuses to grant permission to sell or sublicense its intellectual property to AT&T?

23. U S WEST's position is that AT&T should bear the burden of obtaining the permission and paying any required fees to the third party. U S WEST further contends that it should not be held responsible for damages caused by a breach of the license agreements U S WEST holds with the third party owners. U S WEST states that its proposed contract language recognizes that it is not in a position to mandate that an independent, third party owner sell its property to anyone. U S WEST further states that it has offered to facilitate any negotiations between AT&T and the third party in an effort to facilitate AT&T's use of such third party property. If the third party owner refuses to grant AT&T permission, then U S WEST believes AT&T should be responsible for any damages caused by unlawful use of the third party intellectual property. U S WEST argues it is unreasonable and unfair if AT&T insists that U S WEST provide a service even if it means violating a license agreement, and that U S WEST must then bear responsibility for all damages resulting from such violation.

24. AT&T argues that U S WEST's contract term would prohibit CLEC access to some of the most vital network elements unless and until a new entrant negotiates a separate agreement with literally dozens of third parties whose intellectual property rights could be infringed by such access. AT&T asserts that the Act's requirement in § 251(c)(3) which permits new entrants' access to ILECs' network elements, is critical to effectively opening the local exchange market to competition. AT&T alleges that U S WEST's position is an attempt to impose a potentially fatal barrier to entry by CLECs in the local exchange market.

25. AT&T also makes the following assertions, which are undisputed by U S WEST:

(a) U S WEST has not established that the mere sale of UNEs to AT&T or any other CLEC would necessarily require an amendment to U S WEST's existing licenses. The provisioning of access to UNEs, according to AT&T, likely constitutes U S WEST's own use or an internal business purpose that would not require an additional license or any additional license fee.

(b) If it is necessary to amend existing licenses, the 1996 Act obligates U S WEST to obtain amendments instead of using its existing licenses as a shield to prevent competitive entry to local markets. The requirement in § 251(c) that U S WEST provide nondiscriminatory access to network elements means that the access received by CLECs and the element itself must be at least equal in quality to that which the ILEC provides to itself. This prevents the ILEC from prospectively entering into agreements with its vendors that would preclude it from providing nondiscriminatory access to its facilities to new entrants. AT&T asserts that U S WEST has an affirmative duty to negotiate future agreements to include any provisions that might be necessary to facilitate its obligations under the Act for services. It further argues that U S WEST's existing licenses should be treated no differently because ¶ 202 of the FCC's Interconnection Order[6] requires U S WEST to make feasible modifications to its existing facilities in order to provide nondiscriminatory access to new entrants. Therefore, the Commission should ~~conclude that the~~ Act imposes on U S WEST an obligation to renegotiate its license agreements to ensure that CLECs are provided with access to its network that is at least equal in quality to that which U S WEST enjoys.

(c) U S WEST's obligation to negotiate license amendments is a part of the general policy requirement that ILECs' unique economies be shared with new entrants. Interconnection Order, at ¶ 11. U S WEST by virtue of its size and large capital investment, has leverage with existing vendors so that it can reopen licenses in the ordinary course of business and achieve cost economies and efficiencies otherwise unavailable to new entrants. On the other hand, AT&T and other CLECs would be forced to negotiate for the sole purpose of securing permission to use the vendors' intellectual property, and the likely result would be fees in excess of those paid by U S WEST as part of the purchase of the equipment.

(d) The FCC's Infrastructure Sharing Order[7] is analogous to this situation. The FCC rejected a similar argument by an ILEC that sharing intellectual property must be condi-

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[6] In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98, FCC 96-325, 11 F.C.C.R. 15499 (1996) (Interconnection Order), Order on Reconsideration, 11 F.C.C.R. 13042 (1996), Second Order on Reconsideration, 11 F.C.C.R. 19738 (1996), Third Order on Reconsideration, 12 F.C.C.R. 12460 (1997).

[7] In the Matter of Implementation of Infrastructure Sharing Provisions in the Telecommunications Act of 1996, Report and Order, 12 F.C.C.R. 5470 (Suppl.), CC Docket No. 96-237, FCC 97-36 (Feb. 7, 1997) (Infrastructure Sharing Order).

tioned on the qualifying carrier's obtaining a license from persons having a protected interest in the property, stating that § 259(a) of the Act requires ILECs to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by the qualifying carrier for the purpose of enabling the carrier to provide telecommunications services. AT&T asserts that this order stands for the following: If the only way a CLEC such as AT&T can obtain access to U S WEST's network is to first modify the private contracts that U S WEST has with vendors, then U S WEST has the affirmative duty to seek and obtain those licenses from third parties and it is not enough for U S WEST to offer to "use reasonable efforts to facilitate" AT&T's negotiations with the vendors. AT&T argues that this Infrastructure Sharing Order is persuasive authority for requiring U S WEST to take steps, if necessary, to modify existing agreements and licenses as part of its broader duty to comply with the nondiscrimination obligations in the Act. U S WEST has every incentive to construe its existing contractual arrangements to preclude it from satisfying its obligation to provide nondiscriminatory access to UNEs.

26. AT&T's language requires each party to obtain consent of third parties if such consent is required to allow the other to use the party's respective network; this duty is appropriately the responsibility of the party who owns and operates the network. AT&T asserts that U S WEST should be ordered to obtain all necessary licenses from third parties, both prospectively and for existing agreements, so that AT&T can use U S WEST's facilities.

27. This issue is particularly difficult to resolve because the Commission has no information about the contents of U S WEST's existing intellectual property agreements. The record is devoid of information to shed light on what may actually be involved in obtaining

modifications or sublicenses to U S WEST's existing agreements, whether any such modifications or sublicenses are in fact necessary, and what obstacles may be present that prevent either U S WEST or AT&T from negotiating required changes. Further, there is no evidence that quantifies the number of sublicenses required or separate agreements that may have to be modified.

28. The issue is further complicated by U S WEST's refusal to grant AT&T any access to its network. See Issue No. A-1 above which discusses combination of elements. Added to that is the lack of legal precedent to guide our decision. The Commission's resolution of this issue must consider not only AT&T, but also other CLECs who may adopt AT&T's interconnection agreement as their own. Further, the Commission's decision may affect other CLECs who negotiate their own agreements with U S WEST. Finally, we have no record evidence or other source from which to conclude that access to unbundled elements as contemplated by the 1996 Act can be classed as anything other than U S WEST's own use of third party intellectual property.

29. Given this lack of evidentiary and noticeable material, the Commission concludes that its decision should be based on the pro-competitive policies set forth in Montana and federal law. The Commission concludes that U S WEST has not made a persuasive argument to support its position. U S WEST's proposed contract language states that U S WEST will "use reasonable efforts to provide a list of all known and necessary Third Party Intellectual Property applicable to the other Party, and, to the extent necessary, use reasonable efforts to facilitate the negotiation of any necessary licenses." The record is bare as to whether U S WEST has taken any steps to facilitate negotiations for AT&T or any other CLEC.

30. The Commission has approved nearly thirty interconnection agreements to date. Rarely a week goes by without at least one filing for approval of an agreement between U S WEST and another party--for resale, for unbundled elements, for facilities interconnection, or a combination of the three. There is no indication that this will slow down; rather, although anecdotal, Commission staff has had indications that there are a number of new entrants who are either in the process of negotiating agreements with U S WEST, or are waiting for this AT&T contract to become effective so they can adopt it as their own.

31. For Montana agreements alone, third party vendors could be inundated with requests for licenses. These licenses would likely be different than the licenses U S WEST obtains for itself as the owner of the network facilities. The CLECs may need to be privy to U S WEST's agreements so they can understand what it is they need to have a license to use. It would seem much simpler and more efficient for U S WEST to negotiate these sublicenses so that all CLECs are covered by them. Therefore, the Commission rejects U S WEST's proposed Section 5.3.

32. From that conclusion, it seems the logical next step is to require U S WEST to bear the cost of obtaining these sublicenses for CLECs because to require payment of AT&T and/or other CLECs who have already executed agreements with U S WEST for interconnection would place an unproportionate share of costs on these CLECs. The Commission rejects U S WEST's contract Section 5.2, which would have required CLECs to obtain a license or permission for access or use of intellectual property, to make all payment to obtain the license, and to provide evidence of the license.

33. The Commission accepts AT&T's proposed language in the last sentence of its proposed Section 5.1 as a preferable alternative to U S WEST's Sections 5.2 and 5.3. The Commission also accepts other language in AT&T's proposed Section 5.1, which is similar to that of U S WEST's Section 5.4. The deleted language in AT&T's 5.1 appears to allow a party to unilaterally determine when the other party can grant non-exclusive languages; U S WEST's correlative language would permit a party to treat the intellectual property as if it were not joint property. The Commission has received no evidence or briefing on either party's position relating to use of jointly-owned intellectual property.

34. Not all language in these proposed clauses is accepted, however, and corrections should be made as shown below. The Commission has rejected and accepted certain parts of the parties' several sections on intellectual property. Because of the way they are drafted, it is not possible to accept either party's sections in full. The first two sentences and the last sentence in AT&T's Section 5.1, accepted by the Commission, should read as follows:

> 5.1 Any intellectual property jointly developed in the course of performing this Agreement shall belong to both Parties ~~who shall have the right to grant non-exclusive licenses to third parties except as otherwise designated in writing by one Party to another.~~ Any intellectual property which originates from or is developed by a Party shall remain in the exclusive ownership of that Party. ~~Except for a limited license to use patents or copyrights to the extent necessary for the Parties to use any facilities or equipment (including software) or to receive any service solely as provided under this Agreement, no license in patent, copyright, trademark or trade secret, or other proprietary or intellectual property presently or hereafter owned, controlled or licensable by a Party, is granted to the other Party or shall be implied or arise by estoppel.~~ It is the responsibility of each Party to ensure at no additional cost to the other Party that it has obtained any necessary licenses in relation to intellectual property of third parties used in its network that may be required to enable the other party to use

> **any facilities or equipment (including software), to receive any service, or to perform its respective obligations under this Agreement.**

35. The emboldened language stricken above should be deleted; the Commission finds U S WEST's analogous section 5.1 a more complete provision as it includes trade secrets in the grant of the right to use. The remainder of U S WEST's indemnification sections are not accepted; AT&T's proposed Section 5.2--relating to indemnification--is not accepted. See Issue No. A-4 below, explaining the Commission's rationale for the indemnification issue.

3. Issue No. A-4: Indemnification - Part A, Section 18

36. The indemnification section is directly related to the intellectual property provisions. The parties have agreed to most of the substance of the indemnification provisions in Section 18 of the parties' agreement. In our discussion of the next previous issue, the Commission rejected AT&T's proposed indemnification term in AT&T's proposed Section 5.2. U S WEST's proposed term relating to indemnification for damages arising with regard to third party intellectual property, Section 18.1, is similarly rejected. AT&T's language would require U S WEST to indemnify for actions arising pursuant to AT&T's use of third party intellectual property; U S WEST's language does the opposite--it would completely indemnify U S WEST from any claim arising pursuant to third party intellectual property. The Commission concludes that neither provision is appropriate, considering the lack of information with which to decide the related issue. Under the circumstances, it is better that liability for such claims be determined individually on a case-by-case basis. That should incent both parties to work for a resolution of intellectual property sublicensing.

4. Issue No. A-5: Limitation of Liability - Part A, Section 19

37. U S WEST contends that its language should govern the parties' agreement because it reflects the traditional limitations of liability as set forth in its tariffs. AT&T argues that an additional clause should be inserted which would permit the Commission, an arbitrator, or other decision maker to award consequential damages if such decision maker determines that a "pattern of conduct" justifies consequential damages.

38. AT&T expressed a concern that U S WEST could evade its obligations under the Act by engaging in a pattern of seemingly *de minimus* contract breaches which, when taken together, constitute a serious impairment of rights. AT&T has not made a persuasive argument for including this clause in a contract of this nature. The Commission accepts U S WEST's version of Section 19.3, which is language that both parties have agreed upon without the phrase pertaining to a "pattern of conduct."

5. Issue No. A-6: Notice of New Changes - Part A, Section 23.2

39. At the September 25, 1997 informal meeting with Commission staff, the parties represented to staff that they had agreed to a compromise on this issue.

6. Issue No. A-7: Directory Listings (Commissions) - Part A, Section 44.1.12

40. At the September 25, 1997 informal meeting with Commission staff, the parties represented to staff that they had agreed to a compromise on this issue.

7. Issue No. A-8: Treatment by Directory Publishing Affiliates - Part A, Section 44.1.7

41. At the September 25, 1997 informal meeting with Commission staff, the parties represented to staff that they had reached agreement on this issue.

8. **Issue No. A-9: U S WEST Customer Database Revenues - Part A, Section 44.2.1**

42. This issue concerns the sale of directory listings to third parties. U S WEST has made such sales while it has enjoyed a monopoly in the local exchange market. AT&T believes it should receive a pro rata share of revenues from such sales. AT&T concedes that listing its customers in U S WEST's directories benefits AT&T. However, AT&T contends that listing AT&T's customers in U S WEST's directories also benefits U S WEST. AT&T notes that U S WEST must list CLECs' customer listings in its directories to comply with § 271(c)(2)(B)(iii) of the 1996 Act, the "competitive checklist" for entry into the interLATA long distance market. Further, AT&T states that U S WEST can claim its directories are "complete" because they include all customers--even its competitors' customers--and that this completeness increases the value of U S WEST's directories to U S WEST and its customers. This, according to AT&T, gives U S WEST an advantage when it markets its directory listing database.

43. U S WEST proposes to retain all revenues from the sale of all directory listings, including AT&T's customers and presumably those of other CLECs. U S WEST states that it has marketed such lists for many years and has maintained and updated the database at its own expense. U S WEST states that it will not charge AT&T for any AT&T listing in the U S WEST database and AT&T's argument that U S WEST will unfairly benefit from the sale of AT&T's listings is without merit, because AT&T can build, maintain and market its own database to the same providers for inclusion in the same directories as U S WEST does. U S WEST argues that it is inequitable for AT&T to expect payment when, at the same time, AT&T is making demands on U S WEST to include AT&T's listings in U S WEST's white pages.

44. Neither party has cited any statute or regulation to support its arguments. U S WEST must include CLECs' customer listings in order to be permitted to enter the in-region interLATA toll market. Clearly there is benefit to U S WEST for maintaining the database. Further, both parties benefit when their customers are included in the same directory. Therefore, the Commission concludes that U S WEST may not sell AT&T's customer listings without its permission unless it compensates AT&T for its pro rata share of the directory listings database. U S WEST's database customers will likely expect a complete list, and U S WEST can advise them to contact AT&T to purchase a list of AT&T's customers.

9. <u>Issues No. A-10, A-11, A-13, and A-14: Call Monitoring of Directory Assistance Service Centers - Part A, Sections 50.2.3.7 and 50.2.3.7.1; Call Monitoring of Operator Service Centers - Part A, Sections 50.3.5 and 50.3.5.1</u>

45. At the September 25, 1997 informal meeting with Commission staff, the parties represented to staff that they had agreed to use language which they had worked out in their similar Idaho negotiations.

10. <u>Issue No. A-12: Instant Credit for Operator Services - Part A, Section 50.3.3.2(o)</u>

46. This issue concerns how U S WEST will recover from AT&T the cost for the underlying service that U S WEST provides to AT&T's end users when it credits a customer for a call after calling the operator with a complaint. U S WEST will offer a credit to the end user in these cases; that is not the dispute here. U S WEST believes that AT&T should pay for the operator services that U S WEST provides to the end user in arranging for the credit. U S WEST proposes to charge 36 cents for each local call unless it determines that U S WEST was not

responsible for the problem. In the latter case, AT&T will not have to pay for the operator services provided. This is not a question of credit to the customer.

47. The Commission agrees with U S WEST's position and accepts U S WEST's proposed language. Much of AT&T's proposed term relates to calls referred to AT&T toll-free numbers, an issue not discussed in the parties' briefs.

B. Attachment 1: Rates and Charges

1. <u>Issue No. 1-1: Construction Charges - Attachment 1, Section 3.2</u>

48. AT&T opposes the following contract language proposed by U S WEST:

> U S WEST will provide unbundled Network Elements through U S WEST's existing facilities. U S WEST is not required to construct new facilities to accommodate AT&T requests for unbundled network elements.

49. The Eighth Circuit held that the Act does not require an ILEC to provide superior quality interconnection and unbundled access. Rather, it requires access to the existing network, notwithstanding the fact that the new entrant is willing to compensate the ILEC for superior quality. U S WEST interprets <u>Iowa Utils. Bd.</u> to require it to offer only its existing facilities to provide UNEs to AT&T. According to U S WEST, that case clearly states that U S WEST need not accommodate AT&T's requests for new facilities even if AT&T is willing to pay for such construction. U S WEST wants the proposed language included "to clearly define U S WEST's obligations related to construction of facilities." AT&T argues that the proposed language would nullify other contract provisions relating to construction of facilities which the parties have already agreed upon.

50. The Commission addressed this issue in its <u>Arbitration Order</u> in this Docket dated March 20, 1997. Order No. 5961b required that U S WEST provide superior facilities upon

request by AT&T. The Eighth Circuit thereafter ruled that U S WEST need not honor requests from CLECs to construct superior facilities. That ruling, however, does not obliterate the Commission's decision. Although AT&T may not require U S WEST to construct superior facilities, U S WEST must still construct facilities where it would construct them for its own end-user customer. Like the end-user customer, AT&T is also U S WEST's customer.

51. U S WEST's proposed contract language would void the construction obligation imposed upon it by §§ 251(c)(2) and (c)(3) of the 1996 Act, which require an ILEC to construct facilities necessary to accommodate a CLEC's access to UNEs or interconnection. A clear example of this obligation is the requirement that U S WEST invest in upgraded Operations Support Systems (OSS)--one of the required unbundled elements.

52. More important, however, is U S WEST's obligation under state law. In Order No. 5961b, the Commission made a policy ruling requiring U S WEST to construct facilities requested by AT&T when U S WEST would construct those facilities for its own customers. Billing for such construction is to be determined in the same manner as U S WEST currently bills its customers pursuant to its tariffs on file with the Commission. For resold services, the Commission's decision clearly imposed an obligation on U S WEST to construct facilities for AT&T. This policy decision recognizes that AT&T is in fact a customer of U S WEST and should have the same expectations regarding U S WEST's construction policies as U S WEST's end user customers. It is reasonable to extend that decision to require construction when a CLEC requests facilities when providing service through unbundled elements obtained from U S WEST.

53. The Commission has also designated U S WEST as an eligible telecommunications carrier with respect to the federal universal service support program. U S WEST signed a self-certification form stating that it offers the services supported by the fund throughout its service territory in Montana.

54. The Commission concludes that U S WEST has an involuntary obligation to construct some facilities when AT&T provides service using U S WEST's UNEs, limited only by U S WEST's general regulatory service obligation to customers in its service territory. U S WEST's proposed Section 3.2 may conflict with existing law and should be deleted from the parties' contract.

2. <u>**Issue No. 1-2: Loop Conditioning - Attachment 1, Section 4.2**</u>

55. During the September 25, 1997 informal staff meeting, it became apparent that there was no real dispute on this issue. The parties agreed to draft clearer language to substitute for Section 4.2.

3. <u>**Issue No. 1-3: Compensation for transport and termination - Attachment 1, Section 5**</u>

56. At the September 25, 1997 informal staff meeting, the parties agreed to substitute the language they had agreed to in Idaho for this section.

C. Part 3.

1. <u>**Issue No. 3-1: Combinations of Network Elements - Attachment 3, Section 1.2.2**</u>

57. See the discussion and resolution of Issue No. A-1.

2. Issue No. 3-2: Combinations and Demarcation Points - Attachment 3, Section 2.5

58. See the discussion and resolution of Issue No. A-1.

3. Issue No. 3-3: "Combinations of Network Elements - Attachment 3, Section 3.3

59. See the discussion and resolution of Issue No. A-1.

4. Issue No. 3-4: Shared Transport - Attachment 3, Section 5

60. This issue concerns whether U S WEST must unbundle common local transport between U S WEST's central offices and whether not doing so would violate the 1996 Act by impairing the rights of CLECs. U S WEST argues that AT&T's proposed shared transport language violates the Eighth Circuit's decision holding that ILECs do not have to combine network elements on behalf of a requesting carrier, and requests that AT&T's proposed term be rejected. AT&T contends that U S WEST's proposal reverses routing priority by consigning AT&T's traffic to the more costly transmission path in violation of the nondiscrimination mandates of the Act.

61. In its Interconnection Order,[8] the FCC expressly required ILECs to provide unbundled access to shared transmission facilities between end offices and the tandem switch. The dispute here, however, is over whether U S WEST must do so between end offices. The FCC addressed this issue in its Third Order on Reconsideration in the same docket,[9] and specifically rejected the argument U S WEST has made here, concluding that ILECs must

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[8] Interconnection Order, 11 F.C.C.R. at 15706, at ¶ 412.

[9] Third Order on Reconsideration, 12 F.C.C.R. 5482, ¶ 25.

provide shared transport between end offices, between tandems, and between tandems and end offices. As this FCC decision has not been stayed or overturned, this Commission is bound to follow it. The Commission accepts AT&T's language because it is consistent with the 1996 Act and the FCC's orders implementing the Act.

5. <u>Issue No. 3-5: Performance Standards - Attachment 3, Section 18.2</u>

62. During the September 25, 1998 informal staff meeting, the parties agreed to withdraw this issue and to use the Idaho provision in their agreement.

D. Part 4.

1. <u>Issue No. 4-1: Local/Toll Combined Traffic - Attachment 4, Section 8.2.1</u>

63. AT&T wants to combine both toll and local traffic originating in AT&T's switches and terminating in U S WEST's end offices on the same interoffice trunk group. AT&T agrees to comply with specific conditions requiring it to measure the types of traffic carried on the trunks for billing purposes. It also agrees to limit the amount of local traffic carried on the trunks to minimize the blockage of toll traffic on them. U S WEST objects to AT&T's proposal, and would require AT&T to use separate trunk groups for its toll and local traffic.

64. AT&T explains that it initially believed that U S WEST required separate trunks for toll and local traffic because it was technically infeasible to combine them. AT&T asserts that it has since learned that U S WEST's separate trunking requirement is a choice it has made for policy reasons. AT&T argues that U S WEST's proposal to require AT&T to have one trunk group for toll traffic and another for local traffic is costly, inefficient and unnecessary. Moreover, there is no technical reason why both local and toll traffic cannot be carried over the same trunk group.

65. AT&T concedes that allowing too much local traffic to be carried over a trunk group that also carries toll traffic can cause excessive blockage of the toll traffic. Accordingly, AT&T has proposed safeguards that would substantially mitigate this concern. AT&T offers to provide a verifiable and auditable means of assuring U S WEST that AT&T is complying with these safeguards. AT&T will also provide a measure of the amount of local and toll traffic on the trunk groups for billing purposes. Further, AT&T will pay U S WEST access charges for toll traffic and transport and termination charges for local traffic.

66. U S WEST contends that AT&T's request to combine toll and local traffic is an attempt by AT&T to avoid the costs and risks of entering the local telephone market using UNEs. U S WEST states that it currently separates its local and toll traffic in different trunk groups.

67. U S WEST is concerned that combining the traffic will degrade the quality of access services it provides to interexchange companies (IXCs). According to U S WEST, it wants to ensure that it meets its grade-of-service obligations to IXCs. U S WEST states that local traffic is engineered at a lower engineering (blocking) criterion than access traffic. Further, U S WEST states that AT&T can unilaterally decide to route local traffic over its toll trunks, but this decision could affect other carriers because the trunks are engineered to send overflow traffic through U S WEST's tandem switch. According to U S WEST, this could result in AT&T's local traffic mixing with other carriers' traffic on the same trunk group. Finally, U S WEST states that if AT&T prevails on this issue, other CLECs may adopt this contract and the cumulative impacts on U S WEST's facilities could seriously degrade the quality of U S WEST's access services.

68. The Commission concludes that U S WEST has not argued persuasively that combining local and toll traffic in the same trunk group is technically feasible or particularly harmful to its network, especially in light of the safeguards that AT&T has proposed. Further, the FCC clearly prohibits U S WEST from requiring AT&T and any other requesting carrier to use separate trunk groups to provide exchange access service (for tolls calls) and to provide local exchange service. *See* Third Order on Reconsideration, 12 F.C.C.R. 5487-97, ¶¶ 38, 39 and 52.

E. Part 7.

1. Issue No. 7-1: Operational Support Systems - Attachment 7, Section 9.1

69. At the informal staff meeting held on September 25, 1997, the parties agreed to resolve this issue with language from their Idaho agreement.

CONCLUSIONS OF LAW

1. The Commission has authority to supervise, regulate and control public utilities. Section 69-3-102, MCA. U S WEST and AT&T are public utilities offering regulated telecommunications services in the State of Montana. Section 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. Section 69-3-103, MCA.

3. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the states, to be handled by the state agency with regulatory control over telecommunications carriers. *See generally*, Telecommunications Act of

1996, Pub. L. No. 104-104, 110 Stat. 56 (*amending scattered sections of the* Communications Act of 1934, 47 U.S.C. §§ 151, *et seq.*). The Montana Public Service Commission is the Montana agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this Docket pursuant to Title 69, Chapter 3, MCA.

4. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this Docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

5. The 1996 Act permits either party to a negotiation pursuant to 47 U.S.C. § 251 to petition this Commission to arbitrate any open issues in the negotiation of an interconnection contract, according to the parameters included in 47 U.S.C. § 252(b)(1).

6. Arbitration by the Commission is subject to the requirements of federal law as set forth in 47 U.S.C. § 252. Section 252(b)(4)(A) limits the Commission's consideration of a petition for arbitration to the issues set forth in the petition and the response and to imposing appropriate conditions as required to implement § 251(c) upon the parties to the agreement.

7. In resolving by arbitrating under 47 U.S.C. § 252(b) and imposing conditions upon the parties to the agreement, the Commission is required to (1) ensure that the resolution and conditions meet the requirements of § 251, including the FCC regulations prescribed pursuant to § 251; (2) establish rates for interconnection, services, or network elements according to the pricing standards in subsection (d); and (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement. 47 U.S.C. § 252(c). The resolution of the disputed issues in this Docket meets the requirements of 47 U.S.C. § 252(c).

The FCC's regulations adopted to implement § 251 of the Telecommunications Act of 1996 are binding on this Commission, except the sections relating to the pricing and the "pick and choose" rules which were stayed by the U.S. Court of Appeals for the Eighth Circuit pending consolidated appeals; *inter alia,* subsequently vacated by the Eighth Circuit; and are now pending appeal before the United States Supreme Court in Iowa Utils. Bd. v. FCC, 120 F.3d 753 (1997), *cert. granted*, 118 S.Ct. 683.

8. The Commission properly decides all issues presented by the parties, including disputes arising following resolution of the issues presented in the petition for arbitration. Section 252(c) of the 1996 Act does not limit the matters that may be arbitrated by the Commission, except the express provision that requires state commissions to limit consideration to the issues set forth by the parties in the petition and the response. 47 U.S.C. § 252 does not limit the issues that the parties may request the Commission to arbitrate and does not require that the Commission only resolve issues identified as unresolved at the time of the arbitration.

9. Where the Commission has regulatory jurisdiction, it must apply federal law as well as state law, and where Congress has preempted state law, the Federal law prevails. *See* FERC v. Mississippi, 102 S.Ct. 2126 (1982).

ORDER

THEREFORE, based upon the foregoing, it is ORDERED that the issues presented for Commission decision following the initial arbitration are resolved as set forth above; and

IT IS FURTHER ORDERED that a single executed agreement incorporating the provisions of this Order, Order No. 5961b, and Order No. 5961c shall be filed with the Commission for approval within 14 days of service of this ORDER.

DONE AND DATED this 21st day of April, 1998, by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

Dave Fisher

DAVE FISHER, Chairman

Nancy McCaffree

NANCY McCAFFREE, Vice Chair

Bob Anderson

BOB ANDERSON, Commissioner

Danny Oberg

DANNY OBERG, Commissioner

Bob Rowe

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. <u>See</u> ARM 38.2.4806.

MONTANA PUBLIC SERVICE COMMISSION

CERTIFICATE OF SERVICE

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I hereby certify that a copy of an ORDER ON SUPPLEMENTAL DISPUTED ISSUES, in Docket D96.11.200, in the matter of AT&T AND USWC, dated April 30, 1998, has today been served on all parties listed on the Commission's most current service list, updated 5/14/97, by mailing a copy thereof to each party by first class mail, postage prepaid.

Date: April 30, 1998

Kathlene Thompson
For The Commission

Intervenors

Montana Consumer Counsel